No. 15785

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LUIS L. CERVANTES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

The jurisdiction of the District Court is founded upon Section 3231, Title 18, United States Code. The jurisdiction of the Court of Appeals to entertain this matter may be found under the provisions of Section 1291, Title 28, United States Code, and Rules 37 and 39 of the Federal Rules of Criminal Procedure.

II.

Statement of the Case.

Appellant was convicted after trial by jury in the Southern District of California on February 23, 1956 on three counts of illegally importing, transporting, and concealing narcotics; to-wit, heroin and marihuana, in viola-

tion of Section 174, Title 21, United States Code, and Section 545, Title 18, United States Code. During the trial Appellant's Motion to Suppress Evidence was denied after testimony had been taken out of the presence of the jury. On March 16, 1956, Cervantes was committed to the custody of the Attorney General for a period of eight years on each of counts one and two and for a period of five years on count three. All sentences were ordered to run concurrently. A fine of $100 was imposed on each of the three counts.

Notice of Appeal was received by the Court on March 22, 1956 and lodged by the Clerk, March 23, 1956. On May 10, 1956, the District Court certified that the Appeal was not taken in good faith and denied Appellant permission to prosecute the Appeal *in forma pauperis*. On September 24, 1956, this Honorable Court ordered the Appeal dismissed and a mandate was forwarded to the District Court, which mandate was spread on October 29, 1956. Thereafter, this Honorable Court reinstated the Appeal, and directed that an attorney be appointed for Appellant and that he be permitted to proceed *in forma pauperis*.

III.

Specification of Error.

Appellant urges only one point in the Appeal now pending before this Honorable Court: "* * * whether the Customs and Immigration officers who detained and searched Mr. Cervantes had reasonable grounds to believe him to be carrying contraband of committing a felony."

IV.

Statement of the Facts.

References designated "P. Tr." refer to the partial transcript docketed on November 14, 1957, and the references to "Rep. Tr." refer to the Reporter's Transcript for Appeal. Clifford J. Davis is a Patrol Inspector employed by the Immigration & Naturalization Service at Oceanside, California. He is also an authorized Customs Inspector [Rep. Tr. p. 10]. On December 8, 1955, Davis was working out of Oceanside and stopped the defendant while the latter was driving north on Highway 101 near San Clemente [Rep. Tr. pp. 11, 13]. After stopping the car a search of the driver yielded Government's Exhibit 1 [Rep. Tr. pp. 14, 15]. The contents of this exhibit were subsequently analyzed and found to be heroin [Rep. Tr. p. 65]. This search of the driver also produced Government's Exhibit 2, a hypodermic syringe [Rep. Tr. pp. 15, 16]. Thereafter the defendant, his lady passenger, and the automobile were transported to San Clemente [Rep. Tr. p. 55]. At San Clemente a further search of the vehicle was conducted and this search revealed a number of marihuana seeds [Govt. Ex. 3; Rep. Tr. pp. 56, 57] and a "secret" compartment [Rep. Tr. pp. 56, 57]. The defendant's automobile had been stopped as a result of a "lookout" posted by Mr. Grant of the Customs Service [P. Tr. pp. 13, 20], which directed that a Chrysler automobile with a given license number containing two passengers, a man and woman, should be stopped and the occupants and the vehicle searched [P. Tr. p. 27]. Mr. Grant testified that the basis for his directing that the described vehicle and its occupants be stopped and searched was as follows: On September 27, 1955 [P. Tr. pp. 6,

11], he received information from a source described as one who "has informed" [P. Tr. p. 23] that a man of Mexican extraction [P. Tr. p. 17] by the name of "Luis", last name unknown [P. Tr. pp. 11, 20], had come to Tijuana from Los Angeles to purchase narcotics [P. Tr. p. 17]. The information was that "Luis" was dealing with one Manuel Vargas [P. Tr. pp. 11, 24]—a person known to Mr. Grant since 1946 as a vendor of narcotics in Tijuana [P. Tr. p. 12]. The informant further advised that the car driven by "Luis" contained a secret compartment for hiding marihuana [P. Tr. pp. 17, 19, 20, 24]. The description of the car was not positive [P. Tr. pp. 17, 20], being described as a green Plymouth or Dodge. Mr. Grant was supplied with two possible license numbers [P. Tr. pp. 11, 16, 20]. A lookout for this car was placed at the border by Mr. Grant; however, without success [P. Tr. p. 11]. Mr. Grant thereafter ran a license check for the first number and letter of the license number given but found no Dodge or Plymouth registered to a "Luis" [P. Tr. pp. 11, 17, 17a].

On October 25, 1955, Mr. Grant was again contacted by the same informant [P. Tr. p. 23], and advised that the car concerning which the previous information had been supplied was again in Tijuana [P. Tr. p. 23]. At this time the informant gave a corrected license number [P. Tr. pp. 21, 22, 23]. Mr. Grant went to Tijuana and observed the defendant in the described auto [P. Tr. pp. 12, 17a, 22]. A lookout was again placed at the border [P. Tr. p. 12]; however, it was apparently unsuccessful.

The corrected license number was checked by Mr. Grant and it was discovered that the automobile was registered to Luis Cervantes in Los Angeles [P. Tr. pp. 13, 17a, 22]. A check of the San Diego Police Department records revealed that in 1941 Luis Cervantes had been convicted in Federal Court for smuggling marihuana [P. Tr. pp. 16 and 18] and had a number of other arrests for narcotics [P. Tr. pp. 7, 13 and 18].

On December 8, 1955, Mr. Grant again observed the defendant and the automobile in Tijuana [P. Tr. pp. 17a, 18 and 19]. At this time Grant again placed a lookout at the border and requested that Oceanside be advised by radio [P. Tr. pp. 12, 20]. Mr. Grant has been employed by the Customs Service for 25 years, during 16 of which he has been assigned to San Diego [P. Tr. p. 25]. Grant considered Tijuana the main source of supply for narcotics in California and in the cases he had investigated 75 per cent of the contraband was going outside of San Diego and most of this to Los Angeles [P. Tr. p. 27]. Highway 101, where Inspector Davis stopped the defendant [Rep. Tr. p. 13] is one of the two main arteries leading north out of the San Diego area [P. Tr. pp. 5, 28].

V.
ARGUMENT.

A. The Constitution of the United States Prohibits Only Searches and Seizures Which Are Unreasonable.

The Fourth Amendment to the Constitution provides in effect that all persons shall be secure not only in their persons but in their property and effects, and shall be free from searches and seizures which are unreasonable. It is important to note that not all searches are prohibited by this Amendment, but only those which are "unreasonable". (*Carroll v. United States,* 267 U. S. 132, 147 (1925).) Stated another way, this Amendment protects persons against officers acting on "whim, caprice or mere suspicion". (*Brinegar v. United States,* 338 U. S. 160, 177 (1949).) The test by which the actions of officers in making a search must be examined has been often stated. The rule is that before officers may conduct a search there must be probable cause for such action.

> "Probable cause exists where 'the facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief' that an offense has been or is being committed. *Carroll v. United States,* 167 U. S. 132, 162."
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> *Brinegar v. United States, supra,* pp. 175, 176;
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> *Hamer v. United States,* ..... F. 2d ..... (9th Cir., 1958), p. 13, Slip opinion; decided Aug. 26, 1958;
>
> *Lowery v. United States,* 135 F. 2d 626 (9th Cir., 1943);

Cannon, et al. v. United States, 158 F. 2d 952, 954 (5th Cir., 1946) Cert. den. 330 U. S. 839, Rehearing denied 331 U. S. 863;

United States v. Walker, 246 F. 2d 519, 526 (7th Cir., 1957);

Gillam v. United States, 189 F. 2d 321 (6th Cir., 1951).

B. Under the Facts of This Case as Adduced During the Hearing on the Motion to Suppress, It Cannot Be Said That the Trial Judge Erred in His Conclusion That the Officers Had Probable Cause for Their Actions.

An examination of the rule quoted before indicates that the question of whether or not probable cause exists is essentially a factual inquiry, and no fixed formula can be arrived at.

United States v. Rabinowitz, 339 U. S. 56, 63 (1950);

Rocchia v. United States, 78 F. 2d 966, 969 (9th Cir., 1935).

Although as noted each case must be decided on its own particular facts, this Honorable Court's attention is respectfully invited to the following authorities, wherein a finding of probable cause was held appropriate:

Brinegar v. United States, supra;

Carroll, et al. v. United States, supra;

White v. United States, 16 F. 2d 870 (9th Cir., 1926);

Leong Chong Wing v. United States, 95 F. 2d 903 (9th Cir., 1938);

United States v. Li Fat Tong, 152 F. 2d 650 (2nd Cir., 1945);

United States v. Walker, supra;

Scheer v. United States, 305 U. S. 251 (1938);

Draper v. United States, 248 F. 2d 295 (10th Cir., 1957).

Appellee is not unmindful of the decision of the Supreme Court of the United States in *United States v. Di Re,* 332 U. S. 581 (1948). It is submitted that to an extent the *Di Re* case may be explained by the failure of the officers to obtain a warrant (*United States v. Walker, supra,* p. 525). In the case presently pending before this Honorable Court there is specific statutory authority for the action taken by the officers in the absence of a warrant (19 U. S. C. 482; see *Carroll v. United States, supra,* pp. 151, 152). In any event Appellant concedes that there is no absolute requirement that Customs Officers must obtain a warrant (Appellant's Op. Br. p. 8; see *United States v. Rabinowitz, supra,* pp. 65 to 66).

The majority opinion in the *Di Re* case, however, went on to observe that even if a search of the vehicle on the basis of probable cause could have been justified such authority would not extend to the right to search the occupant Di Re (*United States v. Di Re, supra,* pp. 584, 587). It should be noted that in the *Di Re* case the officers had absolutely no information whatsoever about Di Re until they had approached the automobile and been advised by an informant that the driver, who was not Di Re, had supplied counterfeit coupons. In the case now pending, although the information was relayed to the Customs Service with reference to a particular vehicle the information essentially concerned the activities of the man controlling the auto. On December 8, 1955, when Agent Grant of the Customs Service observed Appellant in Tijuana, Mexico, Mr. Grant had knowledge of the follow-

ing facts: On September 27, 1955, he had received information from a source described as "having informed" that a "Luis" from Los Angeles was in Tijuana in an automobile with a secret compartment and was negotiating with a dealer in narcotics who had been known to Mr. Grant since 1946. On October 28, 1955, the same source advised Mr. Grant that the car was again in Tijuana and corrected the license number and description of the car. On this date the accuracy of the information was to a degree verified by Mr. Grant's personal observation (*Cf. United States v. Walker, supra*), Grant thereafter, checked the motor vehicle registration and found that the auto belonged to a Luis Cervantes from Los Angeles. By December 8, the day on which the search took place, Grant had also ascertained that Luis Cervantes had been convicted for smuggling marihuana and had a number of arrests for narcotics. Certainly, it cannot be said that at this point Grant was acting on a completely uninvestigated tip of an informer (compare: *United States v. Castle,* 138 Fed. Supp. 436, relied on by Appellant). Furthermore, the place that Mr. Grant observed Appellant on December 8 (Tijuana), is not without significance. It is submitted that the geographical relationship between San Clemente, the place of the search, and Tijuana [*Cf.* Rep. Tr. p. 60] and the fact that Tijuana is a well known source for illicit drugs are matters of which this Court might properly take judicial notice (*Carroll v. United States, supra,* p. 160), We have in the instant case, however, the direct testimony of Mr. Grant (*Brinegar v. United States, supra,* p. 167; *Gillam v. United States, supra*) that he had been employed by the Customs Service for 26 years, that part of his duties concerned detection of narcotic violators and that he had been assigned to the San Diego area for sixteen years.

He knew Tijuana as a main source of supply for illicit drugs and in the cases he investigated 75 per cent left the San Diego area. Grant knew the defendant was from Los Angeles, and Highway 101 was one of the main arteries leading north. Certainly, with all of these factors in mind it cannot be validly argued that Mr. Grant's directive to stop the defendant if he was discovered going north on Highway 101 toward Los Angeles was an act of caprice or whim.

Assuming that Mr. Grant reasonably concluded that the defendant was transporting narcotics from Tijuana to Los Angeles it should be noted that such a conclusion indicated a serious felony (21 U. S. C. Secs. 174 and 176(a)). There was nothing to indicate that a misdemeanor only was involved (compare *Clay v. United States,* 239 F. 2d 196 (5th Cir., 1956) relied on by Appellant, and *United States v. Di Re, supra,* p. 592).

In summary, it is respectfully submitted that a reasonably prudent man with the knowledge, experience, and information possessed by Mr. Grant would have been prompted to a conclusion that the defendant was engaged in transporting narcotics from Tijuana, Mexico to Los Angeles, California; hence, it cannot be said that the trial judge erred in denying Appellant's Motion to Suppress and concluding that Agent Grant's actions were justified.

See:

Lowery v. United States, supra;

King v. United States, 1 F. 2d 931 (9th Cir., 1924);

Medina v. United States, 158 F. 2d 955 (5th Cir., 1946).

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment of conviction in the District Court should be affirmed.

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